Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1620

ROBERT L. GILMORE,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party in Interest with Petitioner Gilmore in Proceedings Below,

vs.

WEYERHAEUSER COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REASONS FOR DENYING THE WRIT

1. The Court of Appeal's decision is manifestly supported by the language

of the statute.

As one of his reasons offered for granting the writ, petitioner claims that the decision of the Court of Appeals "disregards the intent of Congress as expressed in the legislative history of the 1972 Amendments to the Act and the Act itself...." (Pet. 17) To the contrary, the Court of Appeals decision adopts the only reasonable interpretation of the statutory language.

The fundamental question involved here is whether petitioner is covered by the Longshoremen's and Harbor Worker's Compensation Act (LHCA). Under that Act, as it was amended in 1972, petitioner is entitled to coverage for injuries which occur on navigable waters provided he is employed by a maritime employer and is himself "engaged in maritime employment".

§902(3).

Respondent has admitted throughout that it is a maritime employer, i.e. that one or more of its employees (but not petitioner) are engaged in maritime employment. See §902(4). The Benefits Review Board held that petitioner was injured on navigable waters. Therefore, the sole issue decided by the Court of Appeals, as stated in its opinion, was:

> "Whether the Claimant [petitioner] was at the time of his injury an employee "engaged in maritime employment" within the purpose and purview of §902(3) of the LHCA." (Petition, App. B, page 8.)

The phrase "engaged in maritime employment" is not defined by the Act. This phrase was added by the 1972 Amendments, so that under the pre-amendment Act the petitioner would have been covered provided he was injured on navigable waters and was employed by a maritime

employer. The Benefits Review Board held that since petitioner would have been covered under the prior Act, and since the 1972 Amendments were intended by Congress to "extend coverage", petitioner must therefore be covered under the amended Act.

The Court of Appeals correctly rejected this fallacious reasoning because it completely ignored the statutory requirement that the claimant be engaged in maritime employment at the time of his injury.

The Court of Appeals addressed petitioner's argument, renewed here, that the legislative history of the 1972 Amendments supported the board's "expansion" reasoning. The court cited legislative history which contradicted petitioner's argument (see Petition,

App. B, pages 12-13, and concluded that petitioner as well as the board reached the "erroneous conclusion" that petitioner is entitled to LHCA benefits because of the frequently stated "expension" of coverage by the 1972 Amendments. The court pointed out that this expansion refers only to the definition of "navigable waters", which now includes adjoining areas such as piers. See §903(a).

The court then went on to define "maritime employment" consistently with this Court's decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), and Fourth Circuit decisions in Onley v. South Carolina Electric & Gas Company, 488 F.2d 758 (4th Cir. 1973), and Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973), namely, that the employees' duties

> "...must have a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters..." (Petition, App. B, page 17).

The court concluded that petitioner's duties did not fit this description. He was a sawmill worker, a member of a non-maritime union rather than a maritime union, whose duties fortuitously were performed adjacent to navigable waters.

2. The decision of the Ninth Circuit does not conflict with any decision of the Supreme Court.

Petitioner argues that the decision of the Ninth Circuit "admittedly" conflicts with this Court's decisions in Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962) and Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941). What petitioner ignores is the fact these decisions were rendered prior to the 1972

Amendments. Under the earlier Act, an employee was covered if he satisfied two tests: his injury occurred on navigable waters; and he was employed by a "maritime employer". The 1972 Amendments added the requirement that the employee himself be engaged in "maritime employment." Therefore, decisions under the pre-amendment Act did not address this issue.

Petitioner cites decisions of this Court which imply that employment is "maritime" if it occurs on navigable waters. See Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), Rosengrant v. Havard, 273 U.S. 664 (1927), and Sultan Railway v. Department of Labor, 277 U.S. 135 (1928). The issue before the Court in those cases, however, was whether the injury was suffered in a

maritime location and therefore subject to federal jurisdiction. As mentioned, the pre-amendment version of LHCA incorporated this locality or situs test. The use of a locality test in determining federal maritime tort jurisdiction has recently been criticized by this Court. See Executive Jet Aviation, Inc. v. City of Cleveland, supra.

The 1972 Amendments expressed Congress' abandonment of the locality test as the sole determinant of an employee's right to coverage. Now an employee must satisfy a status test, i.e., maritime employment, which obviously cannot be satisfied by the mere fact that an employee is injured on navigable waters. Therefore, any decision of this Court which expresses or implies that an

employee is "maritime" because he is injured on navigable waters would have no applicability to the amended LHCA.

CONCLUSION

Petitioner seeks coverage under the Act merely because he was injured on navigable waters. However, under the 1972 Amendments he must also be engaged in "maritime employment". If petitioner were held to be engaged in "maritime employment" because he was injured on navigable waters, the "maritime employment" requirement of §902(3) would be simply erased from the statute. The Ninth Circuit has construed "maritime employment" as employment having a direct or substantial relationship to navigation or commerce on navigable waters. This decision is consistent with this Court's decision in Executive

Jet Aviation, supra at 261, where the Court observed that

> "...reliance on relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

Respectfully submitted,

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